Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,
Respondents.

Appendix to Petition for Writ of Certiorari
VOLUME 1 of 2
(A-1 to A-62)

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March 1999

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAINS BIODIVERSITY PROJECT; BLUE MOUNTAIN NATIVE FOREST ALLIANCE; SOCIETY ADVOCATING NATURAL ECOSYSTEMS; CASCADIA FIRE ECOLOGY EDUCATION PROJECT,	)
Plaintiffs-Appellants,	)
v.	)
JEFF BLACKWOOD, in his capacity as Supervisor, Umatilla National Forest; UNITED STATES FOREST SERVICE,	) No. 98-35783) D.C. No. CV-98-98-AA) OPINION
Defendants-Appellees.	) [Ninth Circuit Court of Appeals Filed Dec. 2, 1998]

MALHEUR LUMBER COMPANY; OCHOCO LUMBER COMPANY; PRAIRIE WOOD PRODUCTS; D.R. JOHNSON LUMBER CO.; MALHEUR TIMBER OPERATORS; NORTHWEST FOREST RESOURCE COUNCIL,

Intervenors-Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Ann Aiken, District Judge, Presiding

Argued and Submitted
November 3, 1998--San Francisco, California

Filed December 2, 1998

Before: Betty B. Fletcher and
A. Wallace Tashima, Circuit
Judges, and James M. Fitzgerald,*
District Judge.

Opinion by Judge Fletcher

* The Honorable James M. Fitzgerald, United States Senior District Judge, District of Alaska, sitting by designation

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COUNSEL

Marc D. Fink, Boise, Idaho, for the plaintiffs-appellants.

Michael K. Martin, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Scott W. Horngren, Portland, Oregon, for the intervenors-defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

We are called upon to determine whether the United States Forest Service ("Forest Service") could award a series of contracts for timber salvage sales in the Umatilla National Forest in eastern Oregon without preparing an Environmental

Impact Statement ("EIS") for the largest project and without evaluating the cumulative effects of multiple sales proposed in an area burned by a large wildfire. The Blue Mountains Biodiversity Project, Blue Mountain Native Forest Alliance, Society Advocating Natural Ecosystems, and Cascadia Fire Ecology Education Project (collectively "BMBP") contend that the Forest Service's decision to proceed using an Environmental Assessment instead of a more comprehensive EIS violated the National Environmental Policy Act. The district court denied plaintiffs' motion for summary judgment and permanent injunction and granted the Forest Service's cross- motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand with instructions that the Forest Service prepare an EIS.

FACTUAL AND PROCEDURAL BACKGROUND

The Umatilla National Forest, east of Ukiah, Oregon, includes a portion of the Blue Mountain Range that extends from northeastern Oregon to southeastern Washington. Within the National Forest's borders lies the John Day Basin, the only major river basin in Oregon that contains no dams; it also contains the North Fork of the John Day River, a designated Wild and Scenic River and home to the largest spawning population of summer steelhead and wild spring chinook salmon in the entire Columbia River system.

In August 1996, three wildfires swept through the North Fork John Day watershed. The largest of these fires, the "Tower Fire," engulfed 51,000 acres in a 10- by 14-mile swath. It was the largest wildfire in the recorded history of the Umatilla National Forest. The fire killed all trees, shrubs, and ground cover in several thousand acres. The remaining

acreage burned less intensely. In the end, however, the fire depleted stream shade along miles of streams, exposed soils to erosion, deposited sediment into waterways, killed fish, and destroyed fish and wildlife habitat. Over one half of the acres burned in the Tower Fire drain directly into the North Fork of the John Day River, and the remaining area drains into tributaries that eventually enter the river.

This litigation concerns the Forest Service's decision to conduct salvage logging on several thousand acres of burned forest land in the aftermath of the fire without preparing an EIS. Shortly after the fire, the Forest Service assessed the impacts of the fire on the watershed and developed a comprehensive fire recovery strategy. It identified five areas for timber salvage sales within the Tower Fire area. The Big Tower Salvage and Revegetation Project ("Big Tower" project), the largest project to emerge from the planning process, involved three separate timber sales encompassing 4,186 acres and revegetation efforts on an additional 4,500 acres.

The Forest Service estimated that the Big Tower sales would yield 30 million board feet and would remove all remaining trees within the high intensity burn area that were nine inches or greater at breast height[1]. Sixty-five percent of the acreage to be logged -- 2,720 acres -- contained soils with high erosion potential. Tractors would skid logs off 527 of these acres. The project would require eleven miles of new, temporary roads, and seven miles of reconstructed roads.

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[1] According to the timber purchaser, the actual sale quantity was 23 million board feet. The difference is immaterial to our decision.

After completing an Environmental Assessment ("EA") for the project in July 1997, the Forest Service issued a "Finding of No Significant Impact" on September 8, 1997, and declined to prepare an EIS. The Forest Service also amended the Umatilla National Forest Plan because the Big Tower project did not comply with Forest Plan Standards and Guidelines in certain management areas.

The Big Tower EA identified only one of the four other timber sales proposed for the Tower Fire area and contained no discussion of the total quantities of timber or total acreage proposed for logging in the multiple sales.[2] The EA also failed to identify the locations of any of the 18 miles of road proposed for construction or reconstruction, or the locations of any proposed stream crossings.

BMBP sought to enjoin the Big Tower salvage sales, alleging that the Forest Service failed to comply with the procedural requirements of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C). Defendants-Intervenors are several logging companies including the company that was awarded the contracts for the salvage sales at issue.

BMBP and the Confederated Tribes of the Umatilla Indian Reservation appealed the Forest Service's decision on

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[2] The one referenced sale, the '96 Roadside Salvage," involved logging 6 million board feet on 63 miles of road in the Tower Fire area. An Administrative Appeals Officer reversed the Forest Service's decision on this project in October 1997. In November, 1997, the Forest Service scaled back this project to include only hazard tree removal along 58 miles of road. This new project, renamed the Hairy Hazard project, was categorically excluded from environmental review pursuant to 40 C.F.R. 1508.4.

September 8, 1997.[3] In December 1997, an Administrative Appeals Officer upheld the Forest Service's decision and BMBP appealed in January 1998. On July 24, 1998, the district court granted summary judgment in favor of the Forest Service and intervenors and denied BMBP's motion for summary judgment and permanent injunction. A panel of this court denied BMBP's emergency motion for an injunction pending appeal, but granted its motion for expedited hearing.

Logging began on the sales encompassing the Big Tower project in August 1998. On November 5, 1998, after hearing oral argument in this case, we enjoined all future logging, road building and other ground disturbing activities within the Tower Fire area of the Umatilla National Forest.[4] Post argument, defendants and intervenors advise that more than 80 percent of the timber in the Big Tower project has been cut and removed. Logging on one of the other sale areas, designed to remove hazard trees along the roads, has also begun. No logging has begun on the other projects identified in the Tower Fire area.

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[3] The Tribes have reserved treaty rights to hunt, fish, and graze on land within the Tower Fire Area. They are not parties to this appeal.

[4] On November 9, 1998, in response to defendants' request for clarification, we indicated that our injunction does not prohibit road maintenance, water bar installation, ditch and culvert cleaning, or other erosion prevention measures designed to protect the existing roads from winter erosion. The injunction also does not prohibit hunting or other recreational activities except in such areas and to such extent that the Forest Service determines, in its discretion, that defendants' and intervenors' logging activities have created erosion or erosion-inducing conditions that would be exacerbated by such activities.

STANDARD OF REVIEW

We review de novo the grant and denial of a district court's order granting and denying summary judgment. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). We must determine whether the Forest Service's decision was "based on a consideration of the relevant factors," or whether its actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting the Administrative Procedures Act, 5 U.S.C. § 706(2)(A)). In short, we must ensure that the agency has taken a "hard look" at the environmental consequences of its proposed action. *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

Under this deferential standard, we must defer to an agency's decision that is "fully informed and well-considered." *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). However, we need not forgive a "clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861 (1989). "An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." *Save the Yaak*, 840 F.2d at 717.

ANALYSIS

1. NEPA Requirements for an Environmental Impact Statement

The National Environmental Policy Act ("NEPA") requires a federal agency such as the Forest Service to

prepare a detailed EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA "ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 1845 (1989).

A threshold question in a NEPA case is whether a proposed project will "significantly affect" the environment, thereby triggering the requirement for an EIS. 42 U.S.C. § 4332(2)(C). As a preliminary step, an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS. 40 C.F.R. § 1508.9. An EA is a "concise public document that briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact." *Id.*

If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Save the Yaak*, 840 F.2d at 717. "The statement of reasons is crucial to determining whether the agency took a "hard look" at the potential environmental impact of a project." *Id.* BMBP argues that the Forest Service did not take the requisite "hard look " at the environmental impacts of the Big Tower Project or the cumulative effects of the Big Tower Project and other proposed timber salvage sales. We agree.

An EIS must be prepared if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." *Idaho Sporting Congress*, 137 F.3d at 1149 (internal quotation omitted). Thus, to prevail on a claim that the Forest Service violated its statutory duty to prepare an EIS, a "plaintiff need not show that significant effects will in fact occur." *Id.* at 1150. It is enough for the plaintiff to raise "substantial questions whether a project may have a significant effect" on the environment. *Id.* We conclude that BMBP raised substantial questions about the environmental impacts of the Big Tower project alone and in combination with the other salvage sales proposed in the Tower Fire area.

We rely on NEPA regulations, promulgated by the Council on Environmental Quality ("CEQ"), to guide our review of an agency's determination of "significance." *See* 40 C.F.R. § 1508.27; *see also Marsh*, 490 U.S. at 372 (CEQ regulations entitled to substantial deference). To determine whether a proposed project will have "significant" impacts on the environment, an agency must evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial," and "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. §§ 1508.27(b)(4), (b)(5). [5] BMBP contends that the Forest Service failed to evaluate these factors. We discuss each in turn.

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[5] The regulations identify several other factors that must be analyzed, but plaintiffs only raise these factors on appeal, together with their argument that the cumulative impacts analysis is inadequate.

First, BMBP argues that the Forest Service failed to evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). We have held that "controversial" is "a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993); *Sierra Club v. United States Forest Service*, 843 F.2d 1190 (9th Cir. 1988). In *Sierra Club*, the Forest Service decided to award several timber contracts that contained groves of giant sequoia redwoods without preparing an EIS. *Sierra Club*, 843 F.2d at 1192. The Sierra Club produced evidence from numerous experts showing the EAs' inadequacies and casting serious doubt on the Forest Service's conclusions. We observed that "[t]his is precisely the type of "controversial" action for which an EIS must be prepared." *Id.* at 1193.

Here, BMBP argues that a substantial dispute exists concerning the likelihood and significance of adverse environmental effects from post-fire logging and road construction. BMBP points to an independent report on recommendations for ecologically sound post-fire salvage logging, known as the "Beschta report," prepared before the devastating 1996 fires, that recommends minimal intrusion into severely burned areas and no salvage logging in sensitive areas including severely burned areas and erosive sites. According to the Beschta report, there is no ecological need for immediate intervention in post-fire landscapes. A rapid response, the Beschta report explains, may result in unforeseen, detrimental environmental consequences. The Regional Forest Supervisor directed that the Beschta report recommendations be addressed in post-fire environmental

review documents, but the Forest Service failed to disclose the report's recommendations in the Big Tower EA.

We offer no opinion on whether the Forest Service's omission of any discussion of the Beschta report, alone, would discredit the Forest Service's decision not to prepare an EIS. We do note that its failure to discuss and consider the Beschta report's recommendations lends weight to BMBP's claim that the Forest Service did not take the requisite "hard look" at the environmental consequences of post-fire logging instead of letting nature do the healing. In any event, we focus on BMBP's arguments regarding the key issue of whether the uncertainty and unknown risks associated with this project require an EIS. *See id.*, at 1194.

A project may have significant environmental impacts where its effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. S 1508.27(b)(5). BMBP expressed concern that post-fire salvage logging generates increased sediment loading to the waterways that would cause irreparable damage to the salmon, steelhead, and bull trout populations of the North Fork John Day River, especially in light of the substantial increases in sediment caused by the fire. The Big Tower EA simply fails to persuade that no significant impacts would result from the Big Tower project. We find no documentation of the estimated sediment that would result from the logging and accompanying road building or the impacts of increased sediment on fisheries habitat. The Forest Service's only attempt to measure sedimentation failed when its data collection box overloaded with sediment.

Despite its lack of data, the Forest Service asserts throughout the EA that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire. Whether the increased erosion from logging and road building is smaller or larger than that produced by the fire is irrelevant. The proper evaluation should identify the impact of the increased sediment from the logging and roadbuilding on the fisheries habitat in light of the documented increases that already have resulted from the fire.

We have warned that "general statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). The Forest Service failed to heed that warning. Even though the global EIS for the Umatilla National Forest Plan, as a whole (prepared several years before the fire) acknowledges that "[r]oad building . . . has long been recognized as having high risk for initiating short term soil movement and erosion into streams, and degrading water quality and instream habitat," the Big Tower EA never identifies the location of any of the proposed 18 miles of roads or the number of stream crossings, and reveals only that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire. The Umatilla National Forest Plan classifies about half of the area burned by the Tower Fire as a C7-Special Fish Management Area. The EA, however, merely acknowledges that "[c]oncern has been expressed" about the impact of sediment loading caused by post-fire salvage and road building on

salmon, steelhead, and bull trout populations in the North Fork John Day River system.

The EA's cursory and inconsistent treatment of sedimentation issues, alone, raises substantial questions about the project's effects on the environment and the unknown risks to the area's renowned fish populations. We do not find adequate support for the Forest Service's decision in its argument that the 3,000 page administrative record contains supporting data. The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found. *See* 40 C.F.R. § 1508.9(a) (an environmental assessment is "a concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact").

We also find the discussion of mitigation measures inadequate. The EA identifies a series of Best Management Practices (BMPs) designed, in part, to reduce the erosion from the logging and roadbuilding activities of the Big Tower project. The Forest Service's reliance on these BMPs, however, is based on "past observations of logging on *unburned* areas" with similar soil types where BMPs have prevented "large increases" in erosion. We find nothing in the EA to support the Forest Service's conclusion that the proposed BMPs will be adequate in a severely burned area where increased levels of erosion have already occurred. We note that even before the fire water quality was suffering. One stream in the area failed to meet Oregon's water quality standards for temperature and another exhibited fish habitat impairment.

We also reject the Forest Service's argument that it need not prepare an EIS for the Big Tower project or any of the other proposed sales because these projects may be "tiered" to the Umatilla National Forest Plan EIS and to the other EAs pursuant to federal regulations. "Tiering refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28. Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.

Defendants rely on *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1422-24 (9th Cir. 1989), where we held that a Forest Service decision to log six million board feet of dead and insect-infested trees by cable and helicopter systems to avoid building a road into an unroaded portion of a forest did not require a supplemental EIS for the whole forest. They read *Lyng* too broadly. It does not support the proposition that any scale of logging project is exempt from a project-specific EIS simply because an EIS for a forest plan contemplates that logging may occur. In this case, the largest fire in the history of the Umatilla National Forest dramatically altered the forest ecosystem. The fire occurred several years after the EIS for the Forest Plan was prepared. The Forest Plan EIS does not, and could not, evaluate the impacts of this catastrophic fire, or the additional environmental impacts that large scale logging of severely burned areas could bring. We hold that the tiering regulations do not provide the release from the requirement of an EIS that the Forest Service urges.

2. Cumulative Impacts

We also conclude that the EA is inadequate in addressing the cumulative effects of the multiple salvage logging projects in the Tower Fire area together and in combination with the effects of the fire. A cumulative impact on the environment "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ." 40 C.F.R. § 1508.7. Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time. " *Id.* In determining whether a project will have a "significant" impact on the environment, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). If several actions have a cumulative environmental effect, "this consequence must be considered in an EIS." *Cuddy Mountain*, 137 F.3d at 1378 (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990)).

As part of its Tower Fire recovery strategy, the Forest Service identified five potential logging projects in the same watershed, including the Big Tower project at issue in this appeal. Together, the sales would yield 40 - 55 million board feet logged from the same watershed, require approximately 20 miles of road construction and involve tractor-skid logging on steep slopes. No document explores the collective impact of these projects. Although the EA purports to rely on the Forest Service's "Tower Fire Ecosystem Analysis, " that study assessed only the impacts of the fire on the watershed not the additional impacts of logging several thousand acres and building several miles of roads. It does not substitute for

a meaningful cumulative impacts analysis of the actual logging projects.

BMBP alleges that the Big Tower EA fails to address, or even mention, three of the four other salvage sales proposed for the Tower Fire area. Relying on the Forest Service's own acknowledgment that the five sales are part of a coordnated Tower Fire recovery strategy, BMBP argues that the Forest Service should have evaluated the cumulative impacts of these sales in a single EIS. We agree.

"Significance cannot be avoided by . . . breaking [an action] down into small component parts." 40 C.F.R. § 1508.27(b)(7). We recognize that "the determination of the extent and effect of [cumulative impact] factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club* , 427 U.S. 390, 414, 96 S.Ct. 2718, 2732 (1976)(holding that the Department of the Interior did not need to complete a regionwide EIS for all potential mining projects in the Northern Great Plains area). We also recognize that "NEPA does not require the government to do the impractical." *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 764 (9th Cir. 1996). Here, however, all of the proposed sales were reasonably foreseeable. They were developed as part of a comprehensive forest recovery strategy. In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower EA was completed.[6] At the very least,

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[6] What appears to be a decision by the Forest Service to make

(continued...)

these sales raise substantial questions that they will result in significant environmental impacts. A single EIS, therefore, was required to address the cumulative effects of these proposed sales. *Cuddy Mountain*, 137 F.2d at 1380.

Although we now impose the "snag" that the Forest Service feared but the law requires, the Forest Service has largely succeeded in its strategy. In the two and one-half months between the denial of plaintiffs' motion for injunction pending appeal and our injunction following oral argument, over half of the trees in the Big Tower project area have been cut and removed without the benefit of meaningful environmental analysis. Plaintiffs' appeal is not rendered moot, however, because trees remain standing in the Big Tower area and the Forest Service has not yet acted on its remaining proposed sales in the Tower Fire area. *See Kettle Range Conservation Group v. United States Bureau of Land Management*, 150 F.3d 1083 (9th Cir. 1998)(per curiam) (enjoining BLM from transferring the remaining 10 percent of land under a land exchange found in violation of NEPA

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[6](...continued)
identified timber sales in advance of the completion of the Big Tower EA raises serious questions. In its "Umatilla National Forest Fire Recovery Strategy and Timelines," dated December 1996, the Forest Service explained that its decision to "conduct separate NEPA analysis on subsequent projects...not only simplifies the NEPA analysis, but...also allows some projects to move forward if other projects get snagged in appeals and/or litigation." Expediency and prejudice in favor of logging over NEPA compliance and adequate concern for the environment also appear in a July 1997 letter from the acting Forest Supervisor to logging companies. After observing that "due to the unique fisheries and water quality values in the [Tower Fire area], it is envisioned that the area will be controversial," he noted that the Forest Service's strategy for forest recovery "emphasizes multiple, smaller scale project NEPA preparation to achieve quick success."

even where 90 percent of the land had already been transferred and logged by private parties in violation of NEPA).

Although the district court is to be commended for its close attention to the details of the piece-meal studies undertaken by the Forest Service, it erred in not directing its analysis to the overall purpose of NEPA and its requirement that an EIS be prepared under the circumstances of the major actions proposed in this case in the wake of the great fire. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 471. An EIS is required of an agency in order that it explore, more thoroughly than an EA, the environmental consequences of a proposed action whenever "substantial questions are raised as to whether a project *may* cause significant [environmental] degradation." *Idaho Sporting Congress*, 137 F.3d at 1149. That is exactly the circumstances of this case.

Our decision does not jeopardize the Forest Service's ability to undertake emergency measures in the wake of a disaster. Here, the catastrophic fire burned in August of 1996. The logging began in August of 1998. The Forest Service had ample opportunity and an obligation to undertake a more searching environmental review or to propose activities on a much smaller scale. Although NEPA "does not mandate particular results," it does "prescribe the necessary process." *Methow Valley*, 490 U.S. at 350.

CONCLUSION

The Forest Service has failed to take the "hard look" at the effects of the proposed timber sales that NEPA requires. The Forest Service has not discharged its obligation to undertake a thorough environmental analysis before concluding that no significant environmental impact exists from salvage logging sales in the Tower Fire area. Although our review under the arbitrary and capricious standard is deferential, it does not condone a "clear error of judgment." *Marsh*, 490 U.S. at 378.

In this case, the Forest Service made a clear error of judgment in its decision to prepare only an EA for the Big Tower project and in its failure to analyze the combined effects of several salvage sales in the same watershed developed as part of a coordinated fire recovery strategy. Accordingly, we REVERSE and REMAND to the district court with directions that it remand to the Forest Service for further proceedings consistent with this opinion. The injunction issued by this Court on November 5, 1998, as clarified on November 9, 1998, shall remain in full force and effect until the Forest Service satisfies its NEPA obligations.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,	)	Civil No. 98-98-AA
Plaintiffs,	)	OPINION
v	)	
JEFF BLACKWOOD, et al.,	)	
Defendants	)	
and	)	
MALHEUR LUMBER COMPANY, et al.,	)	[District of Oregon Filed Aug. 24, 1998]
Intervenors-defendants.	)	

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AIKEN, JUDGE:

Plaintiffs bring this action challenging the decisions of Jeff Blackwood, Forest Supervisor of the Umatilla National Forest, and the United States Forest Service (USFS) to approve and proceed with the Big Tower Timber Sale on the North Fork John Day Ranger District of the Umatilla National Forest without first preparing an environmental impact statement (EIS). Plaintiffs allege that defendants' decisions violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. and its implementing regulations, 36 C.F.R. part 219, and the Administrative Procedures Act (APA), 5 U.S.C. § 551 et seq..

Plaintiffs seek: 1) a declaratory judgment and mandatory injunction requiring the defendants to comply with NEPA by preparing an EIS; 2) a permanent injunction

barring defendants from permitting logging, or otherwise proceeding with, the Big Tower Timber Sale until a legally adequate EIS is prepared; 3) a declaratory judgment that proceeding with the Big Tower Timber Sale is not in accordance with applicable law, is arbitrary and capricious agency action, violates NEPA, the CWA, the National Forest Management Act (NFMA), and the APA; and 4) a permanent injunction barring the defendants from permitting logging, or otherwise proceeding with, the Big Tower Salvage and Revegetation Project (Big Tower Project) until defendants can demonstrate adequate and full compliance with all mandatory applicable provisions of NEPA, the CWA, the NFMA, and the APA. Plaintiffs also seek costs and attorney's fees.

Before the court are plaintiffs' motion for summary judgment and permanent injunction (#32), plaintiffs' motion to to file an overlength brief (#33), defendants' motion for summary judgment (#40), and defendants-intervenors motion for summary judgment (#46).

I. FACTS

In August 1996, the Tower Fire ignited during a lightning storm, and was not controlled until September 9, 1996. (AR 1288). The Tower Fire burned approximately 51,000 acres, in a swath about 14 miles long and 10 miles wide in the North Fork John Day District, Umatilla National Forest. (AR 2480). About 5,900 acres burned at "high intensity" ("total absence of live tree crowns and total absence of ground vegetation, with little down wood debris remaining", AR 2373), about 15,600 acres burned at "medium intensity" (scorched tree crowns" but larger down wood debris remains, AR 2373), and about 29,200 acres

burned at "low intensity" ("live tree crowns, minor crown scorching, and a black ash layer on the soil surface," AR 2373). (AR 2485 (table) and 2486 (map)). The Tower Fire impacted 2,500 acres of neighboring private lands, with one-half of those acres already logged. (AR 1312). The EA for the Big Tower Project states that approximately 8,700 National Forest acres within the project area were severely burned, killing all of the trees, and under story shrubs, ground cover vegetation, soil surface litter, and humus in this area were completely consumed. (Id).[1]

When a wildfire burns National Forest System lands, the Forest Service promptly conducts a burned-area survey "to determine if watershed emergency rehabilitation treatment is needed" (Forest Service Manual 2523.03, AR 2370). The Forest Service prepared a report of its survey of the Tower Fire, dated September 16, 1996, called the Burned Area Report. (AR 2370-2387). The Burned Area Report found that 5,943 acres, within the 50,817 acre fire, burned with high intensity. (AR 2370-2371). Only stands with 90% plus dead trees were considered for salvage harvest in the Big Tower Planning Area Silvicultureal Prescription. The prescription states that the Big Tower Fire created a 8,700 acre opening within the planning area. (AR 1359-1370).

Leading up to the Burned Area Report, the Forest Service prepared a number of specialty reports, including reports on forest vegetation, recreation and trails, range, fish, soils and geology, and sensitive wildlife, aquatic, and plant species. (AR 2292-2473). The Burned Area Report recommended a number of emergency actions, such as grass

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[1] Defendant disputes these facts. These facts as modified are supported by the record. Defendants add additional facts which are included.

seeding of highly erodible soils, contour felling of burned trees, and correction of road drainage problems. (AR 2378-2386). These emergency actions were completed in late 1996. (AR 964).

Following the Burned Area Report, the Forest Service developed a Forest-wide recovery strategy for all the fires that burned in 1996. (AR 892-894). As early as December, 1996, the agency "envisioned that several fire salvage projects" would be identified with the Tower Fire area. (AR 893). The North Fork John Day Ranger District identified five timber sales in the Tower Fire area for further analysis, design, and implementation, including 96 Roadside Fire Salvage, Big Tower Project, South Tower, Cable and North Tower. (AR 1415). All five identified sales are within the North Fork John Day Subbasin, in the North Fork John Day Ranger District. (Id.)[2].

The John Day Basin is the only undammed major basin in the state, and the North Fork John Day River supports the largest and most important run of anadromous fish within this Basin. (AR 351). The North Fork and its tributaries support an estimated 70% of the total spring chinook salmon run and 43% of the summer steelhead run within the subbasin. (Id.). This is the largest spawning population of wild spring chinook and summer steelhead in the Columbia River System. (Id.).

The entire length of the North Fork John Day River within the burn area, about 1 1/2 miles, was in a low intensity

[2] Defendants object to plaintiffs' fact 17, and they add additional facts. The court has modified plaintiffs' facts to reflect information in the record, and added defendants' additional facts that are supported by the record.

burn area. (Id.). Although the North Fork John Day is not within the Big Tower Project area, it would be subject to downstream effects on water temperature and sediment from Texas Bar and Oriental Creeks.(Id.)[3]. According to a 1994 scientific assessment of Oregon and Washington's Eastside Forests, completed by expert members of several professional scientific societies at the behest of members of Congress, the North Fork John Day River constitutes an aquatic diversity area, and is vital to the restoration of salmonid populations. (Sterne Declaration Exhibit A).[4] The 1990 Umatilla

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[3] Federal defendants dispute the characterization of the facts in paragraph 1 of plaintiffs' concise statement of facts, or that these facts are material. The facts cited by plaintiff are supported in the record. Additional facts from AR 1173 were added. The court also finds that these facts are material. Federal defendants' seek to add the following additional facts: "Most Chinook spawning and rearing within the North Fork John Day River basin occurs upstream of the area burned by the Tower Fire. The only chinook spawning and rearing areas burned by the Tower Fire burned at low intensity, (AR 1173) with little to no effect on riparian areas, AR 1173, 2486, 2567. In most streams in the North Fork John Day River subbasin the upper headwaters contain resident trout only, with steelhead and resident trout co-occurring in the lower reaches. Streams in headwaters are generally too shallow for the larger sized steelhead; the steelhead trout spawning and rearing habitat within the fire area tends to be downstream of the moderate to high intensity burn areas. (AR 2486, 2567). It is unclear whether the administrative record 1173 supports defendants' statements. Defendants cite to maps contained in the administrative record (AR 2486, 2567). The court cannot determine from looking at the maps whether defendants' facts accurately represent information contained in the maps. Much of the information does not appear to be contained on the maps.

[4] Defendants object to plaintiffs' fact 28, arguing that it is not relevant and it should be excluded as extra record materials. Certain circumstances may justify expanding review beyond the record. National Audubon Society v. U.S. Forest Service, 46 F.3d 1437, 1447 (9th Cir.

(continued...)

National Forest Land and Resource Management Plan (Forest Plan) designated much of the North Fork John Day Subbasin, including slightly more than half (51%) of the Tower Fire area, as a Special Fish Management Area C-7. (AR 2487, 3070). The C-7 management area is an outcome of the North Fork John Day Wilderness designation, which recognized the North Fork John Day River as important to anadromous fish, and provided special management consideration. (Umatilla Forest Plan 4-167).

In 1988, the North Fork John Day River was designated by Congress as a national Wild and Scenic river, indicating that the scenic, geology, fisheries, historic, and

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[4](...continued)

1994). The reviewing court may go outside the record to consider evidence relevant to the substantive merits of an agency decision: 1) to determine whether the agency considered all relevant factors, Thompson, 885 F.2d at 555; 2) to determine whether the agency's "course of inquiry was sufficient or inadequate", Alpine Lakes Protection Soc. v. U.S. Forest Service, 838 F.Supp. 478, 481 (W.D. Wash. 1993)(citations omitted); 3) when it is necessary to explain the agency's action; 4) when the agency has relied on evidence outside the record; 5) to explain technical terms or complex subject matter; or 6) when there is a showing of agency bad faith, National Audubon Society, 46 F.3d at 1447 fn.9. "[A]llegations that an EIS has failed to mention serious environmental consequences, failed to adequately discuss some reasonable alternative, or otherwise swept 'stubborn problems or serious criticisms . . . under the rug,' raises issues sufficiently important to permit the introduction of new evidence in the District Court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary." Suffolk County v. Secretary of Interior, 562 F.2d 1368, 1384-1385 (2nd Cir. 1977), cert. denied, 434 U.S. 1064 (1978)(adopted by the Ninth Circuit in Animal Defense Fund). Plaintiff allegations regarding the short comings of the EA are sufficient to meet this standard. Therefore, the court will permit the introduction of extra record materials.

wildlife values qualified as outstandingly remarkable. (AR 295)[5]. The section of river that borders on the fire, and is within the Big Tower Fire Project Area, is designated as Scenic. (AR 1829). No harvest is planned within the Scenic River corridor, and, in most cases, the closest harvest is more than one-half mile from the river. (Id.). Because of this buffer, the determination was made that there would be no effect on the recreational, visual, cultural, or wildlife values. (Id.). Fisheries management area standards and guidelines for the river corridor were met through implementation of FP standards and guidelines, mitigation, implementation of Best Management Practices (BMPs), and other standards included in the Big Tower Project. (AR 1329-1330).

The Tower Fire burned at high intensity along substantial portions of Texas Bar, South Fork Cable, North Fork Cable, Winom, Oriental, and Sheep Creek, causing destruction of riparian vegetation, and fish kills in at least some of these streams. (AR 983, 2545, 3072). The fire extirpated fish from several stream segments in South Fork Cable, Oriental, and Texas Bar Creeks. (AR 2545, 3072, 3079).[6] Fish kills were observed in the headwaters of South Cable, Oriental, and Texas Bar creeks after the fire, and were suspected in North cable Creek. (AR 2357-2358).

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[5] Defendants object to plaintiffs' fact 3 arguing that these facts are not material to plaintiffs' claims, and adding additional facts. As discussed above, the record reflects that the North Fork John Day would be subject to downstream effects on water temperature and sediment from Texas Bar and Oriental Creeks. Therefore, the court finds these facts material. The court added the additional facts cited by defendants.

[6] Defendants dispute plaintiffs' fact 39, and add additional facts. The court has added defendants' additional facts.

Some recolonization has been documented where monitoring has occurred in South Cable, Texas Bar, and Oriental creeks. (AR 1844). A recolonization study of redband and bull trout, after fire kills in Idaho, found that fish populations approached levels of unaffected streams in one to three years. (AR 605-606).

The North Fork John Day drainage serves as a major migration route for big-game species. (AR 352). Approximately 2,500 elk and 1,000 mule deer use the drainage as a migration corridor between their winter and summer ranges. (Id.). The Tower Fire analysis area is located adjacent to the Bridge Creek State Wildlife Area, an important winter range used extensively by elk. (AR 1397).[7] The Tower Fire area is located within the southern portion of the Ukiah Management Unit, as designated by the Oregon Department of Fish and Wildlife (ODF&W). (AR 1397). This area is meeting overall population objectives set by the agency for elk and deer. (Id.).

In 1997, a second strategy was developed, which focused on the three major fires that had burned in the North Fork John Day District - Bull Fire, Summit Fire, and Tower Fire. (AR 964-968). The strategies called for a number of actions to be taken (AR 892-894, 965-968), one of which was a rapid ecosystem analysis at the watershed scale. (AR 892, 965). An interdisciplinary team was chartered, and it produced a rapid ecosystem report, the Tower Fire Ecosystem Analysis(TFEA), that was approved in March 1997. (AR 2474-2751).

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[7] Defendants object to this fact arguing that it is not material to plaintiffs' claims. One of plaintiffs' argument is that this is an ecologically critical area. These facts are material to that claim. The court has included defendants' additional facts.

The TFEA identified "restoration opportunities and salvage harvests." (AR 2480, 2590-2621). The opportunities for actions now comprising Big Tower Project were first identified by the interdisciplinary team - salvage harvest, revegetation, and road upgrading. (AR 2595-2605, 2591). The TFEA found that, as a result of the fire, "35 terrestrial wildlife species are expected to be extripated from the area which includes the potential reduction of 31 birds and 4 mammals. The occurrence of amphibians and reptile species after the fire is expected to be the same as it was prior to the fire, although, populations may be reduced somewhat." A list of the species not expected to inhabit the Tower Fire area for 15-20 years is contained in the administrative record. (AR 2586). The report stated that thirteen of the species had the potential for local extirpation unless their habitat needs were restored. (AR 2588)[8]. The TFEA also found that:

> "In general, the bird species not expected to inhabit the burn include forest raptors, live-tree bark gleaners, leaf gleaners, understory feeders, and mature crown nesters. The mammal species were primarily tree squirrels and under story foragers that require sizable areas with medium to large green trees and a developed understory. The lack of these habitat components in the area will result in the extirpation of some species for an extended period of time (60-80 years)." (AR 2586).

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[8] Defendants dispute plaintiffs' fact 42 and add additional facts. The court has modified fact 42, and included defendants' additional facts.

The TFEA cited a fire history study which indicated that ponderosa and warm/dry potential vegetation groups have been impacted the most by the advent of fire suppression. (AR 2503). According to the analysis, it is likely that these stands have missed 5-8 fire return events that would have modified the vegetation composition of the forest as well as the vertical continuity of the fuels. (Id.).

The TFEA contains recommendations for the restoration of habitat for the 13 species with the potential for extripation. (AR 2617-2618). The Big Tower Project EA incorporated these recommendations into its mitigation measures. (AR 1308-1309, 1561-1562).

It is estimated that between Big Tower, South Tower, and Cable[9], the Forest Service might propose the salvage of approximately 40-55 million board feet of timber.[10] (Id.). The volume estimate for the Big Tower project is 30 million board feet. (AR 1561). An additional 422 acres will be salvaged in the South Tower, which is being considered in a separate decision-making process. (AR 2223-2224).

The South Tower site would construct 4.7 miles of new temporary logging roads (3.2 miles for commercial thinning and 1.5 miles for Winom salvage), and then harvest

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[9] Defendants object to plaintiffs' fact 27 which states that: The Cable sale would remove an additional 6 million board feet from 1800 acres. Plaintiffs do not cite to any evidence in support of this fact. Defendants also seek to add additional facts, but the evidence they cite to does not support their facts. Therefore, the court will omit these facts.

[10] Defendants object to plaintiffs' fact 19, and adds additional facts. The court has modified plaintiffs' facts and added defendants' facts.

5.5 million board feet of timber from approximately 1200 acres. (Id.)[11]. The harvest includes 2.5 million board feet of commercial thinning on 780 acres, designed to improve tree vigor, adjust stand structure so low intensity prescribed fire could be reintroduced, and minimize potential for destructive crown fires. (Id.). It also includes the salvage of 3 million board feet from 420 acres, designed to achieve visual quality, hazard tree reduction, and species diversity objectives. (Id.). The project includes measures for slope stablization, subsoiling of previously affected areas, 422 acres of reforestation, 164 acres of riparian planting, wildlife habitat restoration, 23 5 miles of road obliteration, 45 miles of road repair, 173 acres of precommercial thinning, and control of vegetation competing with reforestation planting. (Id.). South Tower Fire Recovery Project is proposed to continue restoration following Big Tower Project. (AR 2223-2224).

In the "Tower Fire Salvage" project Categorical Exclusion (CE), the Forest Service proposed to log 0.9 million board feet of timber from 250 acres of the Tower Fires analysis area. (AR 1127)[12]. This decision was appealed, and the project was modified to treat only the hazard tree removal under a CE. (AR 1463).

In the 96 Roadside Project, the Forest Service initially decided to remove all of the hazard trees from 63 miles of logging roads within the Tower Fire analysis area, for an

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[11] Defendants dispute plaintiffs' fact 26, and adds additional facts. Plaintiffs' facts accurately reflect the record, and the court added defendants' facts.

[12] Defendants object to plaintiffs' fact 25, and add additional facts. The court has modified plaintiffs' facts and added defendants' facts.

estimated 6.0 million board feet of timber. (AR 1371-1388)[13]. The 96 Roadside Project was appealed, and the decision reversed in October 1997. (AR 1601-1603). The project was then scaled back to include only hazard trees. The new project, known as the Hairy Hazard Tree Project, was approved in November 1997. (AR 1815-1816).

Within the 96 Roadside EA, the Forest Service stated, "[a]s expected with any ground disturbing activity, the action alternatives would contribute to the cumulative effects of the Tower Fire and past and future management activities (including the planned Big Tower salvage sale) on soil erosion and sedimentation." (AR 1275)[14]. The EA also determined that some increases in sediment would be expected, which "may delay recovery of fish populations in the more heavily roaded watersheds." (AR 1279).

To the north of the Big Tower Project, the Forest Service continues to proceed with the 10.5 million board foot Camas timber sale. (AR 780-781)[15]. The Notice of Decision on the Camas sale modified alternative four to use an adaptive management approach. (Id.). The salvage sales will be monitored to determine if restoration objectives identified in the EA are being achieved. (Id.). The information obtained will be used in developing restoration activities for

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[13] Defendants object to plaintiffs' fact 23, because the 96 Roadside Sale decision was appealed and reversed, and this project no longer exists. The court has noted that fact.

[14] Defendants object to plaintiffs' fact 24, and refer back to the section on the use of BMPs to avoid theses effects. Plaintiffs' facts accurately reflect the record.

[15] Defendants object to plaintiffs' fact 21. The court has modified this fact to reflect new information cited by defendants.

the remainder of the project, which includes the harvest of 6 million board feet of timber in 2000 and 5.5 million board feet in 2001. (Id.). The total volume from the Camas sale is estimated to be 26.5 million board feet. (Id.). The Camas sale drains into the Camas Creek, and not directly into the North Fork John Day River. (AR 789).

To the south of the Big Tower Project, the Forest Service plans to reenter one 35 acre unit of the Turner Otter Salvage Sale and remove 140 thousand board feet of dead timber. (AR 1124). The harvest responds to the purpose and need and the key issues identified in the 1992 EA.[16] (Id.). Restoration activities are planned for the Bull fire area. Activities planned for the Bull Fire area focus on fire restoration and vegetative recovery. (AR 1661).

The Big Tower Project EA accounted for the cumulative effects of the 1996 Roadside Salvage. (AR 1313, 1315). The South Tower Project was still in the planning stages when the Big Tower EA was prepared and approved. (AR 1600, 1302).

The Big Tower Project is a collection of actions intended to help restore an area of the Umatilla National Forest that was burned by the Tower Fire to a condition within the range of natural variability. (AR 217, 266, 966). The Big Tower Project consists of a number of actions to be taken over a period of time: (1) salvage harvest timber sales of about 30 million board feet on about 4,200 acres with about 11 miles of temporary road construction for the sales; (2) tree planting on those roughly 4,200 acres once the trees

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[16] Defendants object to plaintiffs' fact 22, and additional facts. The court has modified these facts according to information in the record.

are harvested; (3) an additional 4,500 acres to be planted by native conifers, hardwoods, and shrubs; and (4) reconstruction of 7 miles of an all-purpose, multiple-use, permanent road. (AR 1291, 1302-1305, 1560-1561).

The final administrative decision on Big Tower Project was made on September 9, 1997, following an open public review process. (AR 1557-1572). The decision was appealed by the Blue Mountain Native Forest Alliance, the Blue Mountains Biodiversity Project, et al., and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). (AR 1665-1813). Informal disposition of the appeal was not successful. (AR 1814, 1817-1818). The deciding officer on appeal upheld the decision in December 1997. (AR 1847-1850). Plaintiffs brought this action on January 22, 1998.

The salvage timber sales, included in the Big Tower Project, are "designed to recover the value of burned timber and begin the recovery of vegetative conditions" on a portion of the area burned by Tower Fire. (AR 966). The particular area for salvage harvest was selected "because it contains the largest volume of high value Ponderosa pine saw timber...over 90% of the trees were dead and chances of natural regeneration were poor due to loss of mature seed trees." (AR 966, 2682-2683).

The Forest Service prepared an EA, and circulated the EA for comment by interested members of the public and agencies. (AR 1285-1338, 1423-1436). The EA was available for review at two open house public meetings. (AR 1446, 1475-1476, 1488, 1502). After a 30-day comment period, the Forest Service responded to substantive comments

it had received. (AR 1423, 1568-1571). The Forest Service determined that the effect on the human environment from the Big Tower Project was not significant, and recorded its determination - a Finding of No Significant Impact. (AR 1566-1567). The Forest Supervisor selected alternative 2 from EA, with modifications, and recorded the decision in a Decision Notice. (AR 1557-1567).

The EA prepared by the Forest Service considered and assessed seven alternatives: the "no-action" alternative, two "action" alternatives, and four alternatives that were not considered in detail. (AR 1302-1307). Comments on the EA alleged that the range of alternatives in the EA was not adequate, and the Forest Service responded to that allegation before a decision was made. (AR 1568). At the time of decision, the Forest Supervisor considered all seven alternatives. (AR 1563-1564). In their appeal of the Forest Supervisor's decision, appellants alleged lack of a reasonable range of alternatives. (AR 1680-1682, 1776-1777). The Forest Service considered the allegation on appeal, and the deciding officer determined that the range of alternatives was adequate. (AR 1820, 1831-1832, 1849).

Only dead trees and trees expected to die in less than a year will be cut in the Big Tower Salvage Project. (AR 1561). All trees less than 9 inches in diameter will be retained. (AR 1303). Unlike the rehabilitation of previous fire burn areas, the Big Tower Project excludes timber harvest entirely from the moderate and low intensity burn areas, and harvest will occur only in areas with 90 percent or greater tree mortality. (AR 129). In addition, near year-round streams, all living and dead trees that provide stream

shade or would be a potential source of beneficial large woody debris will be retained. (AR 1561).

Harvest will occur on gentle and steep slopes and low and high erosive soils. (AR 1319). The fire created 32,000 acres of erosive soils, and, in order to clear trees for the planting of new seedlings, harvest must occur on these soils. (AR 1313, 2368). The Forest Service is adopting numerous erosion prevention measures including the use of helicopter logging, minimizing road stream crossings, rehabilitating existing roads that are sources of sediment, and establishing buffer strips adjacent to the streams. (AR 1291).

The Forest Service adopted a specific BMPs for the Big Tower Project. (AR 1153-58). The Forest Service will strictly adhere to BMPs. (AR 1563). Compliance with BMPs will be closely monitored as the project is implemented. (AR 1310).

The Big Tower Project EA assessed old-growth, management indicator species (MIS), threatened, endangered, and sensitive species (TES), and other species. (AR 1301, 1320-1323, 1327-1331, 1333-1335). Preceding the EA, specialist reports were prepared for wildlife species, fisheries and aquatics, a biological evaluation for wildlife Threatened and Endangered Species (TES), and a biological evaluation for aquatic TES. (AR 1172-179, 1394-1412, 1447-1460, 1547-1549). At the time of the decision, one of the key issues was fisheries habitat and water quality, including certain Management Indicator Species and TES species. (AR 1560, 1563).

On appeal, Blue Mountains Biodiversity Project raised issues of old-growth, MIS, and TES. (AR 1693-1708). The Forest Service considered these issues on appeal, and the appeals deciding officer determined that the assessment was adequate. (AR 1822-1826, 1848-1849).

The Forest Service has monitored the population trends of MIS, as indicated by these excerpts from the annual Umatilla National Forest monitoring reports: 1993 (AR 410-428); 1994 (AR 503-523); 1995 (AR 817-836); and 1996 (AR 1339-1358). The 1997 annual monitoring report has not yet been released.

The Forest Service determined that Big Tower Project was consistent with the Forest Plan, if certain amendments were made. (AR 1336). Those amendments were made at the time of decision. (AR 1565). The specific amendments are described in the EA. (AR 1292-1293).

PACFISH standards will be met. (AR 1828)[17]. The original proposal for harvest as described in the EA, would have included harvest in the outer 50 percent of "Category 1" PACFISH buffer zones. (AR 1305). At the time of the decision, the Forest Supervisor decided, as a mitigation measure, that harvest could only occur in the outer 50 percent if a fish biologist or hydrologist could determine that resource risks were low enough. (AR 1561). Subsequently, when it was discovered that this was impractical, the decision was mitigated again so that no harvest in PACFISH buffer zones was allowed. (AR 1828, 1846).

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[17]PACFISH refers to a set of amendments made simultaneously to all Forest Plans in eastern Oregon and Washington, Idaho, and portions of California that contained anadromous fish producing watersheds. PACFISH is a strategy for the conservation of riparian environments.

The Big Tower Project is consistent with the existing stream buffers for Riparian Habitat Conservation Areas ("RHCA"), as adopted by the PACFISH amendments to the Forest Plan. The PACFISH buffers prohibit or restrict activities within 50 to 300 feet on each side of the stream depending on the stream class. (AR 485, 1869, 1116-1120). The Big Tower Project does not allow timber harvest closer than 150 feet of perennial streams and 50 feet of intermittent streams. (Id.). The buffers exceed the 100 foot maximum buffer along perennial streams in the BMPs for the State of Oregon. (OAR 629-635-0310). The Big Tower Project is designed to locate temporary roads away from streams and minimize stream crossings. (AR 1308, OAR 629-625-0200). No new permanent roads will be constructed. (AR 1291).

While sediment will be produced by salvage activity, the increase is anticipated to be small relative to fire induced increases. (AR 1317). Sediment is a problem in both roaded and unroaded areas. (AR 1314). The EA also explains that the proposed alternative will include stabilization and closure of roads that contribute sediment to streams. (AR 1317).

The Forest Service conducted a thorough assessment of the existing watershed condition to help assess the environmental consequences of the Big Tower Project. (AR 982-1004, 2292-2332, 2476-2751). The Forest Service conducted field inventory work on Big Tower Project to assess the riparian habitat conditions for fish. (AR 3068-3103). The field surveys also collected information about the large woody debris, pool depth, and total stream cover. (AR 3082). The EA considered information that was collected on stream water temperature in the Big Tower analysis area. (AR 3074-3079).

The Forest Service determined that Big Tower Project will comply with Oregon water quality standards. (AR 1567). The issue of water quality was assessed in the water resources report, preceding the EA. (AR 990-991). Specific BMPs were developed for Big Tower Project, preceding the EA. (AR 1153-1158). Water quality was assessed in the EA. (AR 1297, 1320-1323, 1336). At the time of decision, water quality was a key issue. (AR 1560, 1563). Compliance with water quality standards was an issue on appeal, and the appeals deciding officer upheld the record. (AR 1826, 1849).

The Big Tower Project incorporated BMPs into all of the alternatives, including locating harvest units well outside of stream-side buffers, requiring cables or helicopters suspend logs off the ground on steeper slopes to minimize erosion, and dispersing subsurface drainage associated with roads. (AR 1153-1158, 1291, 1308-1309, 1438-1439, 79-167). The BMPs were modified after the EA was published and the changes were endorsed by resource specialists. (AR 1437).

The planning area for the proposed Big Tower Project encompasses all National Forest land within the South Fork Cable, Texas Bar, Turner, Otter, and Oriental subwatersheds. (AR 986). All these subwatersheds, except for the South Fork Cable, drain directly into the North Fork John Day River. (Id).[18] The project area is located entirely within the area burned by the Tower Fire. (AR 1314). It is bounded by the North Fork John Day River to the south, Forest Service

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[18] Defendants dispute these facts. The court has modified these facts according to information contained in the record, and added defendants' additional facts.

Road 52 to the north, and the North Fork John Day Wilderness to the east. (AR 1288). The project area is the area considered for management activities, while the analysis area was used to analyze the effects on a broader scale or to encompass mobile resources such as fish, wildlife, and soil. (Id.).

Wildlife habitat structure within the analysis area has changed dramatically. (AR 1396). Forested habitats have been converted to a very early seral stage that will be dominated by grasses and forbs for several years. (Id.)[19]. 45 percent of the vegetation within the project area was severely burned, and this area does not provide cover under the Forest Plan's definition for cover. (Id.). Harvest would cause an increase in vulnerability to big game during hunting season[20]. (Id.).

The Forest Service has logged much of the analysis area in the past, resulting in soil compaction and soil disturbance, loss of vegetative cover, and many miles of logging roads. (AR 1318).[21] Past regeneration-type harvesting occurred on 1900 acres within the analysis area. (Id.). Timber harvesting results in soil compaction and disturbance. (Id.).

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[19] Defendants dispute plaintiffs' fact 10, and defendants have added additional facts. The court has modified this statement to reflect information in the record, and added defendants' facts.

[20] Defendants object to plaintiffs' fact 16. The court has modified it to reflect information in the record.

[21] Defendants dispute these facts, and adds additional facts. These facts are supported by the record. The court added defendant's additional facts with modifications.

The Forest Plan identifies allowable limits of soil compaction and distribution that will maintain acceptable productivity potentials. (Umatilla Forest Plan 4-80). Compliance with these standards is monitored annually and reported in the Umatilla National Forest's yearly monitoring report. (AR 410, 503, 817, 1339).

The Big Tower Project proposal involves construction of eleven miles of temporary roads, and reconstruction of seven miles of existing roads to access and log 30 million board feet of timber from over 4,186 acres. (AR 1303). Existing road densities within the analysis area average above four miles per square mile, which is considered moderately high. (AR 1318). This is above the Forest Plan's desired future condition of two miles of road per square mile for open roads. (Umatilla National Forest Plan 4-11). No new permanent roads will be constructed as part of this project, and the temporary roads will be closed, obliterated, and treated, where necessary, by subsoiling, waterbaring, and seeding, upon completion of the project activities. (AR 984, 1291). In addition, temporary roads would avoid swales. (AR 985).[22]

Sixty-five percent of the project (2,270 acres) would involve logging on soils with high erosion potential. (AR 1317, 997). "Of this area of high erosion potential, tractors would skid logs off 527 acres." (AR 997).[23] Another 1,184

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[22] Defendants object to plaintiffs' fact 11, and add additional facts. The court has modified both plaintiffs' and defendants' facts to reflect information contained in the record.

[23] Defendants object to plaintiffs' fact 12, and add additional facts. The court finds plaintiffs' facts accurately reflect the record and

(continued...)

acres of the proposed harvest would occur on soils with "moderate" erosion potential, with 526 of these acres again logged with tractors. (AR 998)[24].

The initial units proposed for tractor logging, which fell within the high erosion hazard designations, were field checked by the Forest Service soil scientist to determine their suitability for tractor logging from an erosion hazard viewpoint. (AR 2036). It was determined that many of the units were on suitable slopes, and that tractor logging could proceed without unacceptable risk. (Id.). In other cases, units or portions of units were either dropped from the project, or the logging system was changed to a helicopter or skyline system, which are well adapted for operation on steep, erodible areas, since they cause minimal surface disturbance. (AR 954-955, 1135, 1214, 1217-1219, 2036).

Tractor skidding is "the logging system most likely to reduce ground cover and compact soils, resulting in increased soil erosion potential."[25] However, past observations of logging unburned areas with these soil types has shown that large increases in erosion do not occur after logging as a result of implementation of BMPs . Implementation of soil erosion control BMPs, such as water barring and seeding, and

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[23](...continued)
has added defendants' additional facts.

[24] Defendants object to plaintiffs' fact 4, citing to their objection to fact 12. The court finds that this statement accurately reflects the record.

[25] Defendants object to plaintiffs' fact 13, and add their own facts. The court finds this sentence accurately reflects the record and has included the additional facts added by defendants.

the Big Tower Project area's low rainfall intensity would minimize the erosion potential. (AR 1317).[26]

In the Beschta scientific report, prepared by academic, federal agency, and tribal scientists, the authors determined, that "there is no ecological need for immediate intervention on the post-fire landscape. With respect to the need for management treatments after fires, there is generally no need for urgency, nor is there a universal, ecologically-based need to act at all. By acting quickly, we run the risk of creating new problems before we solve old ones. Ecologically speaking, fires do not require a rapid human response." (AR 566).[27] The Beschta Report further determined that post-burn management activities that accelerate erosion or create soil compaction must be prohibited. (AR 568-569). The report concluded that salvage logging by any method must be prohibited on sensitive soils, including in severely burned areas, on erosive sites, on fragile soils, in riparian areas, on steep slopes, or on any other site where accelerated erosion is possible. (AR 569). The report concluded that no new logging roads should be constructed after an intense wildfire. (AR 569-570).[28]

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[26] Defendants object to plaintiffs' fact 15 which states that: Logging is also proposed within the Riparian Habitat Conservation Areas, citing AR 997. It is unclear from the record whether this fact is supported by AR 997. Therefore, the court has excluded it. Defendants have added additional facts which were included.

[27] Defendants object to plaintiffs' fact 29, and add additional facts. Plaintiffs' facts accurately reflect the record, and the court has added defendants' additional facts.

[28] Defendants object to plaintiffs' fact 30, and add additional facts. Plaintiffs' facts accurately reflect the record, and the court has

(continued...)

The Regional Forester advised the Forest Supervisors that for each individual project or group of similar projects, the Beschta report must be reviewed to determine its applicability to the site-specific conditions and issues in the project area. (AR 560-561).[29] The Beschta report and this directive are contained in the administrative record. (AR 560-576).

Richard Everett, a science team leader for the Forest Service, reviewed the Beschta report and other scientific information, and issued his own report. (AR 577). The Everett report opines that: "unless dead material is removed and stands are subsequently managed for historical tree densities, future fuel loadings will be outside the historical range of variability for both live trees and dead and down, creating the potential for intense reburn situations." (AR 580). The Forest Service is likely to use low-intensity, management ignited fires in the future in dry forest types to achieve vegetative structure and species composition objectives. Excess fuels must be removed from the area to successfully implement this program. (AR 1288). The Everett report opines that the natural decay process is unlikely to remove the current dead tree material before the next fire event, and, therefore, recommends managed reduction in fuel loading. (AR 584). According to the Everett report, "[t]he urgency to remove woody biomass is not based on reducing short-term fire hazard, but on the capture of the economic values and reduction of long-term

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[28](...continued)
added defendants' additional facts.

[29]Defendants object to plaintiffs' fact 31 and add additional facts. Plaintiffs' facts accurately reflect the record, and the court added defendants' additional facts.

fire hazard. The urgency comes from removing wood before it decays, becomes less economically feasible to extract, and makes further reductions in fuel loading more expensive to the American taxpayers." (AR 582).

Soil productivity/erosion/sedimentation was a key issue in the Big Tower Project EA. (AR 1296-1297). The Forest Service implemented the use of BMPs and mitigation to keep effects on soils within Forest Plan standards. (AR 1153-1158, 1308).

A December 1996 Forest Service fire recovery strategy document stated, with reference to the Tower Fire recovery: "[s]ince the Umatilla Tribes have formally requested consultation on this project, and due to the unique fisheries and water quality values this area exhibits, it is envisioned this area will be controversial. One or more EISs may be initiated in the roadless portions of the fire area, depending on the outcome of the ecosystem analysis. We will begin our project analysis in the roaded, less complex portions of the fire area." (AR 893).

No part of the Big Tower Project enters a roadless area. (AR 2488). The Forest Service acknowledged that harvesting in any of the roadless areas would in all probability require preparation of an EIS. (AR 1833).

On January 18, 1997, ODF&W made the following comments: "[h]arvesting with ground based equipment in areas that have been burned has great potential for contributing large amounts of sediment to streams and may do more damage to the watershed than the fire has. If ground based logging is utilized, how will disturbances to the soil

and subsequent increases in turbidity be dealt with?" (AR 953).[30] ODF&W, in a letter dated August 15, 1997, made some general comments after reviewing the Big Tower Project EA. (AR 1499). The letter suggests that erring on the conservative side for entry into RHCA's and PACFISH buffers would reduce the chances of sediment delivery. It also recommends that sites with anything but very low risk for sedimentation, soil erosion, channel drainage, and cumulative effects should not be entered. It suggests that avoiding the construction of even temporary roads would help ensure minimal increases in sediment production. (AR 1499-1500).

Concerns regarding soil disturbances and increases in turbidity were considered in key issue 2 (SoilProductivity/Erosion/ Sedimentation) and key issue 3 (Fisheries Habitat/Water Quality) in the EA. (AR 1296-1298). The rationale for selecting alternative 2, as modified, is contained in the Decision Notice. (AR 1557-1572).

The Confederated Tribes of the Umatilla Indian Reservation, in a letter dated August 20, 1997, made comments regarding the Big Tower Project EA. (AR 1533). The letter points out that: "It is clear from the District's selection of alternative 2 as the preferred alternative that protection and restoration of fish habitat is a secondary issue in this project. . . . The TFEA noted that salvage logging in RHCAs would not benefit fish populations, aquatic habitat or other riparian values, yet the EA alternative 2 would log and build skid trails within RHCAs. The EA recognizes that

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[30] Defendants dispute plaintiffs' fact 33, and add additional facts. The court has modified some of plaintiffs' facts and included defendants' additional facts.

tractor logging will produce a greater amount of sediment than the helicopter logging in alt. 3. Nevertheless, the EA prefers alt. 2, presumbly (sic) for economic reasons." [31]. (AR 1535). Conservation organizations disputed the need to build roads into burned areas, the narrow stream buffers, potential impacts on soils, and the alleged "nonsignificance" of logging 30 million board feet and building logging roads into a sensitive area. (AR 1537, 1504). Hydrologist Jon Rhodes applied the Forest Service's sediment yield model for the Boise National Forest to estimate the impacts of its logging and road building proposal, and, based on this, he concluded that the increase in sedimentation and erosion would be "certainly significant" for the impacted subwatershed. (AR 1797)[32].

The Big Tower Project EA project implementation section provides, in part, that:

> "Skid trails, landings, and temporary roads will be designated. Where possible, temporary roads which parallel stream channels should not be constructed within 300 feet of class 1 and 3 streams and 100 feet of class 4 streams. Skid trails and temporary roads will not be placed in the bottom of swales (drainages without defined channels) ir within RHCAs, except at designated crossings. Designated crossings would only be used to reduce the length (by 1/2 mile or

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[31] Defendants dispute plaintiffs' fact 34, and add additional facts. The court has added defendants' additional facts.

[32] Defendants dispute plaintiffs' fact 36, and add additional facts. The court has included defendants' additional facts.

more) of skid trails or temporary roads that otherwise would have to go around these areas. The District Hydrologist or Fish Biologist would review locations."[33] (AR 1308).

Oregon designated the North Fork John Day as water quality limited for temperature, and Cable Creek as impaired due to temperature and habitat modification.[34] (AR 983, 2497). The Big Tower EA states that, under alternative 2, it is unlikely that the proposed harvesting would have any measurable effects on stream temperature. No trees would be felled in the effective area for vegetative shading, so stream temperatures would not be affected, and stream shade would be accelerated where planting would occur within the RHCAs. (AR 1322).

Mr. Rhodes opines that the Big Tower EA and the TFEA fail to make any estimate of the likely magnitude of erosion and sedimentation delivery caused by the fire. (AR 1794). The Forest Service included a report on the effects of fire on soils and water in the administrative record. (AR 8-77). These reports contain data collected from research watersheds regarding erosion and soil loss after fires. (AR 31). These reports contain other reports on the rates of erosion observed after fires, and information on how water quality is effected after a fire. (AR 54-55, 58-59).

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[33]Defendants dispute plaintiffs' fact 37, and add additional facts. The court has modified these facts and added defendants' additional facts.

[34] Defendants dispute these facts, dispute whether these facts are relevant to plaintiffs' claims, and add additional facts. The court has included defendants' additional facts.

The erosion increases associated with the Big Tower sale "would primarily result from construction of 11.3 miles of temporary roads, skid trails on 2,164 acres, and landings. These actions would have short-term effect on upland soil erosion and sedimentation rates . . .". However, "mitigations of subsoiling temporary roads, skid trails, and landings and erosion control seeding would reduce the intensity and duration of these effects." Harvesting is expected to increase erosion rates, but these increases are expected to be small in comparison to the fire induced increases. The use of soil erosion BMPs is expected to minimize erosion potential. (AR 1317).[35]

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir.), cert. denied, 502 U.S. 994 (1991). The moving party bears the initial burden of proof. See Rebel Oil Company, Inc. v. Atlantic Richfield Company, 51 F.3d 1421, 1435 (9th Cir.), cert. denied, 516 U.S. 987 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. Id.

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[35] Defendants dispute plaintiffs' fact 41, and have aded additional facts. The court has modified fact 41, and included defendants' additional facts.

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. Allen v. City of Los Angeles, 66 F.3d 1052 (9th Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. Id. If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed.R.Civ.P. 56(e); Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995), cert. denied, 517 U.S. 1167 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. Leonard v. Clark, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate specific facts showing there is a genuine issue for trial. Id.

III. DISCUSSION

Standards for Review of Agency Decision

A challenge to an agency's decision not to prepare an EIS presents a "factual dispute the resolution of which implicates substantial agency expertise". Greenpeace Action v. Franklin, 14 F.3d 1324, 1330 (9th Cir. 1993). In cases where "a litigant challenges an agency determination on the grounds that, in essence, allege that the agency's expert review . . . was incomplete, inconclusive, or inaccurate . . . the greater degree of deference expressed by the arbitrary and capricious standard is appropriate." Id. at 1331-1332 (citation omitted). The resolution of factual disputes between the agency's scientific conclusions and those of the plaintiff's experts are subject to the arbitrary and capricious standard of review. Id. at 1331. Decisions involving primarily legal questions are reviewed under the reasonableness standard.

Northcoast Environmental Center v. Glickman, 136 F.3d 660, 667 (9th Cir. 1997).

This case involves predominantly factual determinations, rather than legal determinations. In this case, plaintiffs are challenging the Forest Service's determination that the project would have no significant impact, rendering an EIS unnecessary. This determination was based on the factual determinations of the agency's experts regarding the environmental impacts of the project, and other factual determinations made in deciding whether an EIS was necessary. The court finds that the appropriate standard of review is arbitrary and capricious.

The arbitrary and capricious standard requires the court to ensure that an agency has taken the requisite "hard look" at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is "founded on a reasoned evaluation 'of the relevant factors' " and whether there has been clear error in judgment. Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)(quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). An agency's decision may only be called arbitrary and capricious if the agency: relied on factors which Congress did not intend it to consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before the agency; or offered and explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Southwest Ctr. for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1448 (9th Cir. 1996) (internal citation omitted).

When determining whether an agency's decision is arbitrary and capricious, the court's inquiry into the facts should be searching and careful. Greenpeace Action, 14 F.3d at 1332 (citation omitted). "But, when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Id. (citation and quotations omitted). Even when a plaintiff presents expert opinions raising questions regarding an agency's analyses, methodology, and conclusions, such opinions have been viewed by the courts as "a difference of scientific opinion." Id. at 1333.

NEPA does not require the court to decide whether an agency's evaluation is based on the best scientific methodology available or to resolve disagreements among various scientist as to methodology. Id. (citation and quotations omitted). The court is not empowered to decide that the views of the plaintiff's experts have more merit that the agency's experts. Id. When an agency "is making predictions, within its area of special expertise, at the frontiers of science", the court should defer to an agency's scientific determinations. Baltimore Gas & Electric v. Natural Resources defense Council, Inc., 462 U.S. 87, 103 (1983).

NEPA Regulations

NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "An agency must prepare an EIS if substantial questions are raised as to whether a project . . . may cause a significant

degradation of some human environmental factor. The plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." Greenpeace Action, 14 F.3d at 1332 (citations and quotations omitted).

The Council on Environmental Quality (CEQ) promulgated regulations governing the agency's obligations and responsibilities in applying NEPA. See 40 C.F.R. §§ 1500-1508. The regulations describe three categories of agency action and specify the kind of agency review of environmental issues that is required for each. The categories are: (1) actions that may significantly affect the environment and thus generally require a full environmental impact statement (EIS), 40 C.F.R. § 1501.4(a)(1); (2) actions that may or may not have a significant environmental impact and thus ordinarily require only a more limited environmental assessment (EA) to determine whether an EIS is necessary, 40 C.F.R. § 1501.4(c); and (3) actions that typically do not have a significant effect on the human environment and thus qualify for a "categorical exclusion" from the requirements for the preparation of an EA or an EIS, 40 C.F.R. §§ 1500.4(p), 1501.4(a)(2) and 1508.4.

An EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. §1508.9(a). The information presented in the EA must be of "high quality", and include "accurate scientific analysis". 40 C.F.R. §1500.1(b).

If the agency determines, based on the EA, not to prepare an EIS, the agency must prepare a Finding of No Significant Impact (FONSI). 40 C.F.R. §1501.4(e). The agency must adequately explain its decision not to prepare an EIS by supplying "a convincing statement of reasons why potential effects are insignificant." The Steamboaters v. F.E.R.C., 759 F.2d 1382, 1393 (9th Cir. 1985). The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impacts of the project. Id.

Plaintiffs make the following arguments in support of their motion for summary judgment:

1) the Forest Service failed to consider the proposed projects within the Tower Fire Area, which are similar in timing and geography, and will have cumulative impacts on the environment, in a single NEPA document;

2) the Forest Service failed to adequately address and consider the intensity and significance of the Big Tower Project which involves ecologically critical areas, highly controversial effects, highly uncertain, unique, and unknown risks, cumulative impacts when considered with other projects, and threatens violation of other environmental laws; and

3) an EIS is required because substantial questions remain concerning the potential environmental impacts of the Big Tower Project.

Defendants move for summary judgment and oppose plaintiffs' motion for summary judgment and permanent injunction based on the following arguments:

1) the Forest Service properly separated the Big Tower project from other projects using tiering and scoping;

2) the Forest Service properly considered cumulative impacts on the environment;

3) the Big Tower Project has been designed and modified to avoid significant adverse impacts on the environment;

4) mere proximity of the project to environmentally critical areas is insufficient to trigger the need for an EIS;

5) opposition to the project and disagreement among scientists does not make the project highly controversial;

6) plaintiffs' argument regarding uncertain effects and unknown risks lacks merit;

7) the Big Tower Project will comply with Oregon water quality standards;

8) the Forest Service has adequately addressed the "substantial questions" raised by plaintiffs;

9) the Big Tower project will not have a significant effect on the human environment;

10) the Forest Service considered the alternatives required by NEPA;

11) the Forest Service disclosed the potential effects of the Big Tower Project on water quality;

12) the Forest Service complied with NFMA; and

13) the Forest Service complied with the CWA.

Defendants-Intervenors move for summary judgment and oppose plaintiffs' motion for summary judgment and permanent injunction based on the following arguments:

1) the Forest Service has complied with state water quality standards;

2) the Forest Service has adequately addressed cumulative effects; and

3) the Big Tower Project contains an adequate range of alternatives.

In their reply, plaintiffs make the following additional arguments:

1) CEQ regulations regarding scoping require the Forest Service to do one EIS for similar and cumulative actions; and

2) the concept of tiering does not match the facts of this case because there is no site-specific EIS for any of the sales in the Tower Fire area, and, this is not a case where the Forest Service would be forced to focus on issues that are not yet ripe.

In their reply, defendants and defendant-intervenors make the following additional arguments:

1) the Big Tower EA is tiered to the Forest Plan EIS;

2) plaintiffs have failed to raise substantial questions that the Big Tower Project may significantly affect the quality of the human environment;

3) the Finding of No Significant Impact is supported by the context and intensity of the sale; and

4) there is no controversy over the environmental effects.

Scope of the Big Tower Project EA

Plaintiffs argue that: the Forest Service's failure to consider five proposed projects within the Tower Fire Area, 96 Roadside/Hairy Hazard, Big Tower, South Tower, Cable, and Tower Fire Salvage, which are similar in timing and geography, and will have cumulatively significant impacts[36] on the environment, in a single NEPA document violates NEPA regulations and long-standing Ninth Circuit precedents; the five projects involve the same geographic project area, because they are all within the Tower Fire analysis area, within the North Fork John Day Subbasin, and within the North Fork John Day Ranger District; the five projects are related, because they are all in reaction to the 1996 Tower Fire; the timing of the projects are very similar, because they are all moving forward simultaneously; the concept of tiering does not match the facts of this case

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[36]The court will address the issue of cumulatively significant impacts in the Intensity and Significance section of the discussion.

because there is no site-specific EIS for any of the sales in the Tower Fire area, and, this is not a case where the Forest Service would be forced to focus on issues that are not yet ripe; the Forest Service separated the projects to allow some projects to move forward in case other projects were held up by appeals and to speed up the NEPA process; and the multiple proposed projects have been reasonably foreseeable since at least July of 1997.

Federal defendants argue that: the Big Tower Project has independent utility and can be the subject of its own EA/FONSI; the Forest Service properly tiered the Big Tower Project to the Forest Plan and to other earlier and later projects; the Camas project, the Bull Fire, and the Summit Fire are in a different subwatershed then the Big Tower Project; the Forest Service did not err by dividing the projects into separate NEPA documents because the documents are tiered to each other and the Forest Plan, and they are scoped according to the rules on scoping; and the Forest Service had a rational basis for separating post-fire recovery actions into discrete decisions. Defendant/Intervenors argue that the Bull Fire and the Summit Fire projects have independent utility and are not related to the Big Tower Project.

Scope is defined as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." 40 C.F.R. §1508.25. Agencies are given considerable deference in defining the scope of an EIS, but "there are situations in which an agency is required to consider several related actions in a single EIS. . . . Not to require this would permit dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a

substantial impact." Thomas v. Peterson, 753 F.2d 754, 757 (9th Cir. 1985). CEQ regulations require the agency to consider connected actions, cumulative actions[37], and similar actions[38] in a single EIS. Id. at 758.

The rule against segmentation has exceptions, such as when a project has independent utility or independent significance. See Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974). To prevail on their challenge to the scope of the EA, plaintiffs must show that the Forest Service intentionally segmented the five projects in order to evade the required NEPA documentation, or that the Forest Service's decision to segment the projects was arbitrary and capricious. Foundation for Global Sustainability Incorporated's Forest Protection and Biodiversity Project v. McConnell, 829 F.Supp. 147, 150 (W.D.N.C. 1993). If the Forest Service provides sufficient, legitimate reasons for segmentation, the decision to segment will not be considered arbitrary and capricious. Id.

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[37] Actions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts. 40 C.F.R. §1508.25(a)(2). "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7.

[38] Similar actions are "actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. . . ." 40 C.F.R. §1508.25(a)(3).

In this case, the Forest Service has provided sufficient, legitimate reasons for segmenting the five projects, and for not considering cumulative impacts of the Bull Fire, Summit Fire, and Camas Sale. Only 1% of the Camas area is in the Tower Fire. The Bull Fire and the Summit Fire are located a substantial distance away from the Big Tower Project area. The Forest Service divided the projects based on urgency and the goal of the project.

After the Forest Service took the emergency actions recommended in the Burned Area Report, it proceeded with the Hairy Hazard Tree Project. (AR 966, 1371-1388, 1815-1816). The purpose of this project was to remove safety hazards from along open roads and to create fire breaks along the roads. The project was to be implemented the summer after the fire. (AR 966). The original project was appealed and scaled back to focus only on removal of hazard trees. (AR 1815-1816).

The Forest Service's next priority was the Big Tower Project. The purpose of this project is salvage harvest, revegetation, and road upgrading. (AR 2591, 2595-2605). The timber needed to be recovered quickly to minimize the amount of timber value loss due to deterioration, cracking, and blue stain. (AR 1291).

The next planned action is the South Tower project. The project's main focus is restoration. Timber harvesting activities are not the focus of the project. The project includes slope stablization, subsoiling, 422 acres of reforestation, 164 acres of riparian planting, wildlife habitat restoration, road obliteration, road repair, pre-commercial thinning, and vegetation control. (AR 2223-2224). Plaintiffs

have presented some evidence that the Forest Service segmented the projects to speed up the NEPA process and to avoid having some projects held up in appeals. However, the record shows that the Forest Service had legitimate, rational reasons for splitting up the projects, and while the Forest Service did issue categorical exclusions for the Hairy Hazard Tree project and the Tower project, the Forest Service is completing EAs for the Big Tower Project, the South Tower project, and the Camas project. Based on these reasons, the court does not find that the Forest Service's decision to segment the projects was arbitrary and capricious.